In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 797

PAUL E. SLOANE, ET AL., PETITIONERS

v.

ROBERT H. FINCH, Secretary of Health, Education and Welfare

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 5a-7a) is unreported. The opinion of the court of appeals (Pet. App. 8a-11a) is reported at 396 F. 2d 641.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 1968. A timely filed petition for rehearing was denied on August 6, 1968. Mr. Justice Doug-

las extended the time within which to file a petition for a writ of certiorari to and including December 4, 1968, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly held that earnings for the entire calendar year in which an individual attains the age of 72 are to be taken into account in determining whether deductions for excess earnings are to be made from social security old-age benefits otherwise due the insured in the months of the taxable year prior to the month in which he becomes 72.

STATUTES INVOLVED

Sections 202(a), 203(b), 203(f), 203(h)(1)(A) and 211 of the Social Security Act (42 U.S.C. 402(a), 403(b), 403(f), 403(h)(1)(A) and 411), and Sections 441 and 443 of the Internal Revenue Code of 1954, as amended (26 U.S.C. 441 and 443), are set forth in the Appendix, *infra*, pp. 9-14.

STATEMENT

Petitioner, Paul Sloane, retired as an attorney for Pacific Gas and Electric Company in September 1955, two months after reaching the age of 65. Subsequently, he applied for and received social security old-age insurance benefits from January 1956 through November 1962. Alyse Sloane, relying on her husband's

earnings record, applied for and received benefits from June 1957 through November 1962.

After his retirement in 1955, petitioner opened a law office and practiced law on a full-time basis during the period in which he and his wife were receiving old-age benefits. On July 8, 1962, petitioner became 72 years old. During the calendar year 1962 he had total earnings of $36,365.79, with expenses of $14,707.88, resulting in a total self-employment income of $21,657.91 (Tr. 224, 229) for that year. Although he had worked that entire year at his practice of law, virtually all of his income was received during the second half of the year; specifically, after he had attained the age of 72. Petitioner admitted that he had postponed the receipt of fees for settling several large estates until after his 72nd birthday because he believed that by doing so he could maximize his social security benefits for 1962, *i.e.*, that the old-age benefits he and his wife received for the months of January through June would not be reduced by any earnings received during the months of July through December of that year.

The Social Security Act provides old-age insurance benefits for individuals who have attained the age of 65, are fully insured, and have filed an application for benefits. 42 U.S.C. 402(a) (*infra*, p. 9). However, if an individual has not yet attained the age of 72, and continues to work and receives a salary or self-employment income in excess of a certain minimum amount, his insurance benefits and the benefits of his dependents are reduced in proportion to his total excess earnings for the entire taxable year. The Act

expressly provides that these excess earnings reduce insurance benefits by charging "to the first month of such taxable year an amount of his excess earnings equal to the sum of the payments to which he and all other persons are entitled for such month," with the remaining balance of the excess earnings charged to each succeeding month in such year. 42 U.S.C. 403 (f)(1) (*infra*, pp. 9-10). However, the statute bars the charging of excess earnings to any month "in which such individual was age seventy-two or over" (*ibid.*).

On the basis of these statutory provisions, the Social Security Administration determined that petitioner's earnings for the entire year 1962, rather than only those months prior to his attaining age 72, were to be taken into account in computing his excess earnings for that year. However, it decided, these excess earnings were to be applied only against benefits for those months prior to July 1962—the month in which petitioner became 72. Since the amount of excess earnings, so determined, was sufficiently large to preclude petitioner and his wife from receiving any old-age benefits for the months of January through June 1962, the Social Security Administration concluded that there had been an overpayment of benefits in those months. Accordingly, further payments of benefits were discontinued until the amount of the overpayment was recovered.

Petitioner sought reconsideration of this determination, contending that only those earnings actually received prior to July 1962 were to be taken into account in determining his excess earnings for the year. Since he had no excess earnings during those months,

he argued that he was entitled to old-age benefit payments during those months. Accordingly, he asserted that there had been no overpayment of benefits, and sought reversal of the determination that he was not entitled to benefits for the first six months of 1962.

On reconsideration by the Social Security Administration, the original determination was upheld as correct. Petitioner requested a hearing before a hearing examiner, who upheld the determination of the Social Security Administration. The Appeals Council refused petitioner's request that it review the hearing examiner's decision. Accordingly, the decision of the hearing examiner became the final decision of the Secretary and subject to judicial review under 42 U.S.C. 405(g).

Petitioner thereafter instituted this action in the district court seeking reversal of the Secretary's determination. That court rejected the Secretary's interpretation of the statute and held in favor of petitioner (Pet. App. 7a). The court of appeals reversed the district court's decision, holding that the statute was clear and that the Secretary's interpretation was correct (Pet. App. 11a).

ARGUMENT

The decision of the court below properly reflected the pertinent statutory provisions, and reached the correct result. There is no conflict among the circuits. Thus, no further review is warranted.

1. Section 203(f)(3) of the Social Security Act (42 U.S.C. 403(f)(3), *infra*, pp. 11-12) specifically defines "excess earnings" as the earnings received

during the *taxable year* in excess of a certain minimum. The taxable year of an individual is defined by Section 211(e) of the Act (42 U.S.C. 411(e), *infra*, p. 13) as the calendar year unless the individual has a different taxable year under the Internal Revenue Code. Petitioner did not fall within the enumerated classes of situations in which a tax return can be made for less than a 12-month period.[1] Thus, his taxable year was the entire calendar year of 1962, and was not limited to the months before his 72nd birthday.

Nothing in the language of 42 U.S.C. 403 calls for a different conclusion. To the contrary, 42 U.S.C. 403 (h)(1)(A) (*infra*, pp. 12-13) fully supports the Secretary's determination that where, as here, the individual attains age 72 in the middle of his taxable year, as defined in 42 U.S.C. 411(e), the taxable year for the determination of excess earnings nonetheless remains the entire calendar year. Specifically, that section requires that in such a year, the individual is required to make an earnings report to the Secretary for the entire year. It is only in the taxable year "beginning with or after the month in which such individual attained the age of 72" that no such reports need be made (*ibid.*).

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[1] Section 443 of the Internal Revenue Code (26 U.S.C. 443) provides for returns for periods of less than 12 months only in cases where (1) the taxpayer has changed his annual accounting period, (2) the taxpayer is not in existence for the entire taxable year, (3) or the Commissioner terminates the taxable year because the tax is in jeopardy under 26 U.S.C. 6851. See also 26 U.S.C. 441(b)(3).

There can be no doubt that in view of the foregoing considerations, the Secretary was clearly correct in interpreting the statute to mean that "earnings for the entire year in which a person * * * reaches age 72 * * * are counted in figuring the annual earnings and thus can cause loss of earnings under some conditions." Social Security Administration Handbook, Sec. 1813.[2] Accordingly, in computing petitioner's excess earnings for the year 1962, all of his earnings for that year were includible and not merely those earnings received prior to the month in which he became age 72. As a result, his excess earnings in the first six months of 1962 were sufficiently large to preclude the receipt by him or his wife of any benefits during that period.

2. In any event, as both the district court and the court of appeals recognized, the Secretary's interpretation of 42 U.S.C. 403 at the very least was reasonable. Moreover, it is fully consistent with the purpose of 42 U.S.C. 403(b)(1)(B) to allow individuals to receive any amount of earnings without a reduction of their old-age benefits after the age of 72 (see Pet. App. 7a).[3] In such circumstances, even if another interpretation were possible, "great deference

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[2] Social Security Handbook on Old-Age, Survivors and Disability Insurance (2d ed., 1963). This interpretation also appeared in Section 1707 of the 1st edition of this handbook published in 1960, and the same interpretation was published in the July 1962 issue of "Social Security Rulings" (S.S.R. 62-44, p. 7). See also 20 C.F.R. 404.510(*l*).

[3] Here, admittedly, petitioner's benefits for the month in which he reached age 72 and all of the months thereafter have not been reduced by the Secretary's interpretation.

[is to be shown] to the interpretation given the statute by the officers or agency charged with its administration" (*Udall* v. *Tallman*, 380 U.S. 1, 16; see Pet. App. 10a).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1969.

APPENDIX

1. Provisions of the Social Security Act (42 U.S.C. 402 *et seq.*), in effect at the time in controversy, provide in pertinent part:

> SEC. 402. Old-age and survivors insurance benefit payments—Old-age insurance benefits.
>
> (a) Every individual who—
>
> (1) is a fully insured individual (as defined in section 414(a) of this title),
>
> (2) has attained age 62, and
>
> (3) has filed application for old-age insurance benefits or was entitled to disability insurance benefits for the month preceding the month in which he attains the age of 65,
>
> shall be entitled to an old-age insurance benefit for each month, beginning with the first month after August 1950 in which such individual becomes so entitled to such insurance benefits and ending with the month preceding the month in which he dies. Except as provided in subsection (q) of this section, such individual's old-age insurance benefit for any month shall be equal to his primary insurance amount (as defined in section 415(a) of this title) for such month.
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> * * * *
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> SEC. 403. Reduction of insurance benefits—Maximum benefits.
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> * * * *
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> (b) Deductions on account of work.
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> Deductions, in such amounts and at such time or times as the Secretary shall determine, shall be made from any payment or payments under this subchapter to which an individual is entitled, and from any payment or payments to

which any other persons are entitled on the basis of such individual's wages and self-employment income, until the total of such deductions equals—

(1) Such individual's benefit or benefits under section 402 of this title for any month, and

(2) if such individual was entitled to old-age insurance benefits under section 402(a) of this title for such month, the benefit or benefits of all other persons for such month under section 402 of this title based on such individual's wages and self-employment income,

if for such month he is charged with excess earnings, under the provisions of subsection (f) of this section, equal to the total of benefits referred to in clauses (1) and (2). If the excess earnings so charged are less than such total of benefits, such deductions with respect to such month shall be equal only to the amount of such excess earnings. * * *

* * * *

(f) Months to which earnings are charged.

For purposes of subsection (b) of this section—

(1) The amount of an individual's excess earnings (as defined in paragraph (3)) shall be charged to months as follows: There shall be charged to the first month of such taxable year an amount of his excess earnings equal to the sum of the payments to which he and all other persons are entitled for such month under section 402 of this title on the basis of his wages and self-employment income (or the total of his excess earnings if such excess earnings are less than such sum), and the balance, if any, of such

excess earnings shall be charged to each succeeding month in such year to the extent, in the case of each month, of the sum of the payments to which such individual and all other persons are entitled for such month under section 402 of this title on the basis of his wages and self-employment income, until the total of such excess has been so charged. Where an individual is entitled to benefits under section 402(a) of this title and other persons are entitled to benefits under section 402(b), (c), or (d) of this title on the basis of the wages and self-employment income of such individual, the excess earnings of such individual for any taxable year shall be charged in accordance with the provisions of this subsection before the excess earnings of such persons for a taxable year are charged to months in such individual's taxable year. Notwithstanding the preceding provisions of this paragraph, no part of the excess earnings of an individual shall be charged to any month (A) for which such individual was not entitled to a benefit under this subchapter, (B) in which such individual was age seventy-two or over, (C) in which such individual, if a child entitled to child's insurance benefits, has attained the age of 18, or (D) in which such individual did not engage in self-employment and did not render services for wages (determined as provided in paragraph (5) of this subsection) of more than $100.

* * * *

(3) For purposes of paragraph (1) and subsection (h) of this section, an individual's excess earnings for a taxable year shall be his earnings for such year in excess of the product of $100 multiplied by the number of months in

such year, except that of the first $500 of such excess (or all of such excess if it is less than $500), an amount equal to one-half thereof shall not be included. The excess earnings as derived under the preceding sentence, if not a multiple of $1, shall be reduced to the next lower multiple of $1.

(4) For purposes of clause (D) of paragraph (1)—

(A) An individual will be presumed, with respect to any month, to have been engaged in self-employment in such month until it is shown to the satisfaction of the Secretary that such individual rendered no substantial services in such month with respect to any trade or business the net income or loss of which is includible in computing (as provided in paragraph (5) of this subsection) his net earnings or net loss from self-employment for any taxable year. The Secretary shall by regulations prescribe the methods and criteria for determining whether or not an individual has rendered substantial services with respect to any trade or business.

* * * *

(h) Report of earnings to Secretary.

(1)(A) If an individual is entitled to any monthly insurance benefit under section 402 of this title during any taxable year in which he has earnings or wages, as computed pursuant to paragraph (5) of subsection (f) of this section, in excess of the product of $100 times the number of months in such year, such individual (or the individual who is in receipt of such benefit on his behalf) shall make a report to the Secretary of his earnings (or wages) for such taxable year.

Such report shall be made on or before the fifteenth day of the fourth month following the close of such year and shall contain such information and be made in such manner as the Secretary may by regulations prescribe. Such report need not be made for any taxable year (i) beginning with or after the month in which such individual attained the age of 72, or (ii) if benefit payments for all months (in such taxable year) in which such individual is under age 72 have been suspended under the provisions of the first sentence of paragraph (3) of this subsection.

* * * *

SEC. 411. Definitions relating to self-employment.

* * * *

(e) Taxable year.

The term "taxable year" shall have the same meaning as when used in chapter 1 of Title 26; and the taxable year of any individual shall be a calendar year unless he has a different taxable year for the purposes of chapter 1 of Title 26, in which case his taxable year for the purposes of this subchapter shall be the same as his taxable year under chapter 1 of Title 26.

2. Provisions of the Internal Revenue Code of 1954, as amended (26 U.S.C. 1 *et seq.*), provide in pertinent part:

SEC. 441. Period for computation of taxable income.

* * * *

(b) Taxable year.

For purposes of this subtitle, the term "taxable year" means—

(1) the taxpayer's annual accounting period, if it is a calendar year or a fiscal year;

(2) the calendar year, if subsection (g) applies; or

(3) the period for which the return is made, if a return is made for a period of less than 12 months.

* * * *

SEC. 443. Returns for a period of less than 12 months.

(a) Returns for short period.

A return for a period of less than 12 months (referred to in this section as "short period") shall be made under any of the following circumstances:

(1) Change of annual accounting period.

When the taxpayer, with the approval of the Secretary or his delegate, changes his annual accounting period. In such a case, the return shall be made for the short period beginning on the day after the close of the former taxable year and ending at the close of the day before the day designated as the first day of the new taxable year.

(2) Taxpayer not in existence for entire taxable year.

When the taxpayer is in existence during only part of what would otherwise be his taxable year.

(3) Termination of taxable year for jeopardy.

When the Secretary or his delegate terminates the taxpayer's taxable year under section 6851 (relating to tax in jeopardy).

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